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In The

Supreme Court of the United States

October Term, 1994

THE LAW FIRM OF LANPHERE & URBANIAK, GREGORY S. LANPHERE, and JOEL E. URBANIAK, individually and as partners thereof,

Petitioners,

v.

STATE OF COLORADO, GALE A. NORTON, Attorney General for the State of Colorado, in her official capacity only, ROY ROMER, Governor of the State of Colorado, in his official capacity only,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether Colorado Revised Statute Section 24-72-305.5 creating a content-based prohibition on the use of public judicial records Section 24-72-305.5 violates the First and Fourteenth Amendments.

B. Whether the challenged prohibition on access to judicial records, otherwise open to the general public, based on the future use of such records is violative of Plaintiffs' qualified First Amendment right of access to criminal proceedings under the Fourteenth Amendment.

C. Whether the challenged statute violates petitioners' right to equal protection under the Fourteenth Amendment.

PARTIES

Parties to the proceeding below include the petitioners in the instant case.

Joel E. Urbaniak

Gregory S. Lanphere

Law Firm of Lanphere & Urbaniak

Frank Mutchler was a party to the proceedings below but is not a party to the Petition for Certiorari. Respondents, Roy Romer, the Governor of the State of Colorado and Gale Norton, Attorney General of the State of Colorado, were named in their official capacities as parties in the instant case. The State of Colorado is also named as a respondent.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Joel E. Urbaniak and Gregory S. Lanphere of The Law Firm of Lanphere & Urbaniak respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on April 19, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 21 F.3d 1508 (16th Cir. 1994). This opinion is reproduced in the appendix herein, pp. 3a-29a. The order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is reproduced in the appendix, pp. 1a-2a.

The bench ruling and written order of the United States District Court for the District of Colorado (Weinshienk, D.J.) have not been reported. The bench ruling and the written order are reproduced in the appendix, pp. 30a-38a.

JURISDICTION

Invoking federal jurisdiction under 42 USC § 1983, petitioners initiated this suit in United States District Court for the District of Colorado challenging Colorado Revised Statute Section 24-72-305.5. On November 9, 1992, after hearing argument of cross motions for summary judgment, the Court made a ruling from the bench upholding the statute, entered judgment in favor of defendants, and dismissed petitioners' claims. (App. pp. 33a-38a) On November 13, 1994, the District Court entered a written "Order of Dismissal" denying petitioners' motions for preliminary injunction and summary judgment and granting defendants' motion for summary judgment. (App. pp. 30a-32a).

On petitioners' appeal, the Tenth Circuit affirmed the decision of the District Court upholding the constitutionality of the Colorado Statute on April 19, 1994. (App. pp. 3a-29a) A timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on July 1, 1994.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT ONE

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

COLORADO REVISED STATUTES, SECTION 24-72-305.5

> *Access to records – denial by custodian – use of records to obtain information for solicitation.* Records of official actions and criminal justice records and the names, addresses, telephone numbers, and other information in such records

shall not be used by any person for the purpose of soliciting business for pecuniary gain. The official custodian shall deny any person access to records of official actions and criminal justice records unless such person signs a statement which affirms that such records shall not be used for the direct solicitation of business for pecuniary gain.

INTRODUCTION

The instant case involves a constitutional challenge to a Colorado statute, C.R.S. Section 24-72-305.5 that prohibits access to public official action and criminal justice records if such records are used for the direct solicitation of business for pecuniary gain. The knowing violation of C.R.S. Section 24-72-305.5 is a misdemeanor, subject to a sentence of imprisonment of up to ninety (90) days in the county jail, a fine of up to one hundred dollars ($100.00), or both.

STATEMENT OF THE CASE

Petitioners Gregory S. Lanphere and Joel E. Urbaniak are partners in **The Law Firm of Lanphere & Urbaniak** in Colorado Springs, Colorado. The firm handles, *inter alia*, misdemeanor traffic cases and cases involving charges of driving under the influence of alcohol (DUI). Prior to June 1992, plaintiffs obtained names and addresses of individuals facing prosecution for various traffic violations and DUI from criminal justice and official action records for the purpose of engaging in direct mail solicitation and advertising.

On April 2, 1992, the Colorado legislature passed the following legislative provision:

> § 24-72-305.5 Access to records – denial by custodian – use of records to obtain information for solicitation. Records of official actions and criminal justice records and the names, addresses, telephone numbers, and other information in such records shall not be used by any person for the purpose of soliciting business for pecuniary gain. The official custodian shall deny any person access to records of official actions and criminal justice records unless such person signs a statement which affirms that such records shall not be used for the direct solicitation of business for pecuniary gain.

Colo. Rev. Stat. § 24-72-305.5.

Since the passage of this section, petitioners have been denied access to criminal justice and official action records (collectively referred to hereinafter as "criminal justice records"). Petitioners refuse to sign the statement required under § 24-72-305.5 because they wish to use the names and addresses in such records to engage in direct mail advertising "for the purpose of soliciting business for pecuniary gain."

Plaintiffs brought suit against the State of Colorado in the United States District Court for the District of Colorado alleging a violation of their First and Fourteenth Amendment right to free speech. The district court granted summary judgment for defendant holding that there is no right of access to criminal justice records and that, even if the First Amendment is implicated, the statute at issue survives First Amendment review.

On April 19, 1994, a majority panel of the Tenth Circuit concluded that the challenged restriction on the use of public court records was a content-based restriction on protected commercial speech that was constitutional under *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The majority opinion also determined that Plaintiffs did not have any First Amendment right of access to judicial records under *Press-Enterprise Company v. Superior Court*, 478 U.S. 1 (1986).

Judge Aldisert dissented on the basis that the content-based restriction on access to court records denied Plaintiffs their qualified First Amendment right of access to judicial records. The dissent determined that public access to those records provided significant value "that goes to the very heart of our judicial system" and the governmental interests advanced to justify the restriction were far from compelling. (App. pp. 24a-27a)

A timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on July 1, 1994. (App. pp. 1a-2a)

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. THE TENTH CIRCUIT DECISION IN THE INSTANT CASE IS IN DIRECT CONFLICT WITH THE DECISIONS IN *INNOVATIVE DATABASE SYSTEMS V. MORALES*, 990 F.2d 217 (5th CIR. 1993) AND *SPEER V. MILLER*, 15 F.3d 1007 (11th CIR. 1994) THAT HOLD RESTRICTIONS ON THE USE OF PUBLIC COURT RECORDS VIOLATIVE OF THE FIRST AND FOURTEENTH AMENDMENTS

The Tenth Circuit decision in the instant case upheld a Colorado statute imposing content-based restrictions on the use of court records open to the general public. This decision creates a clear conflict with the Fifth Circuit decision in *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993) and the Eleventh Circuit decision in *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994).[1]

In *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993), a statute prohibiting the use of "crime victim information" or "motor vehicle accident information" to solicit business was declared unconstitutional. The State of Texas asserted that the statute was necessary to promote ethical standards in the legal profession and to prevent fraud and high insurance rates.

The Fifth Circuit stated:

> What is disputed, and what is fatal to the laws in question is the means by which Texas is

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[1] The Fifth and Eleventh Circuit decisions are also in conflict with the decision of the Louisiana Supreme Court in *DeSalvo v. State*, 624 So.2d 897 (La. 1993) that upheld a state statute that prohibited attorneys from gaining access to public motor vehicle accident reports.

> attempting to achieve its goals. A total ban on the *use* of lawfully obtained, public information to contact any person who was recently involved in a motor vehicle accident or who has been the victim of a crime is too broad a prohibition to prevent the perceived evil. 990 F.2d, at 221.

See also, Globe Newspaper Co. v. Fenton, 819 F.Supp. 89 (D.Mass. 1993) (striking down statute that imposed criminal sanctions for communication of public information). The statute struck down in *Innovative Database Systems, supra*, is virtually identical to the Colorado statute upheld by the Tenth Circuit in the instant case.

More recently, the Eleventh Circuit in *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994) reversed a district court's denial of a preliminary injunction to enjoin enforcement of Georgia statute prohibiting inspection or copying of public records for the purpose of commercial solicitation. The Eleventh Circuit specifically rejected the state's assertion that the right of privacy justified a similar prohibition on the use of public records in stating:

> We note that any privacy arguments the state asserts are disingenuous in the light of the fact that the statute carves out an exception for the media to place any information they obtain on the front page of any newspaper in Georgia[2]. 15 F.3d, at 1011 n.7.

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[2] On remand, the District Court for the District of Georgia in *Speer v. Miller* case no. 1:92-CV-1094-Ritti, (D. Ga. August 10, 1994) Sl.Op. pp.12-14, 18-20, specifically rejected the reasoning of the Tenth Circuit in the instant case in striking down the Georgia statute.

See also, McHenry v. The Florida Bar, 21 F.3d 1038 (11th Cir. 1994). In the instant case, the names and addresses of persons charged with traffic offenses are, in fact, published in local newspapers without violating the statute.

Based upon this clear and irreconcilable conflict between the Tenth Circuit decision in the instant case and the decisions of the Fifth and Eleventh Circuits – involving the important issue of the constitutionality of statutes restricting the use of public records *only* when such use is for the purpose of engaging in protected commercial speech – this Court should grant a Writ of Certiorari in the instant case.

II. THE CHALLENGED STATUTE IS A CONTENT-BASED PROHIBITION ON COMMERCIAL SPEECH THAT IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT

A. The Prohibition On The Use Of Records Open To The Public For The Solicitation Of Business For Pecuniary Gain Is Subject To Analysis As A Content-Based Regulation Of Commercial Speech Protected By The First Amendment

The panel opinion evaluated the challenged statute as a content-based regulation of protected commercial speech. (App. pp. 11a, 19a) The panel recognized that "[t]he Colorado Legislature has, in the face of a long common law history of presumed access to court records and a larger statutory scheme that allows for such access, singled out a subgroup for denial of access based on speech content." (App. p. 13a).

The challenged statute directly burdens the *use* of public information for protected speech and is clearly subject to the analysis under the First Amendment. Petitioners seek the same right of access to criminal justice records as every other member of the public. Here, the government seeks to restrict the ability to receive information available to all persons on the basis of the content of communication.

B. The State Has The Burden Of Justifying The Prohibition On The Use Of Public Records For Commercial Speech Contained In C.R.S. § 24-72-305.5

Commercial speech is recognized as expression which does "no more than propose a commercial transaction." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). It is clear that "[l]awyer advertising is in the category of constitutionally protected commercial speech." *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 472 (1988).

In its analysis the panel opinion overlooked the principle that the government bears the burden of justifying any restrictions on commercial speech. *See, Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989).

Recently this Court in *Edenfield v. Fane*, 113 S.Ct. 1792 (1993) reaffirmed this principle:

> It is well established that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Fox*, 492

> U.S., at 480. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. See, *e.g.*, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *Bolger, supra*, 463 U.S. at 73; *In re R.M.J.*, 455 U.S. [191] at 205-206 [1982]; *Central Hudson Gas & Electric Corp.*, [*v. Public Service Comm'n of New York*, 447 U.S. 557] at 569 [1980]; *Friedman v. Rogers*, 440 U.S. [1 (1979)], at 13-15; *Linmark Associates, Inc. v. Willinboro*, 431 U.S. 85 (1977). Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression. 113 S.Ct., at 1800 (parallel citations omitted).

See also Ibanez v. Florida Board of Accountancy, 114 S.Ct. 2084 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505, 1510 (1993). In the instant case, the State wholly failed to meet its burden of properly justifying a content-based restriction on protected commercial speech.

C. The Asserted Government Interest Of Protecting The Privacy Of Persons Charged With Traffic Offenses Is Not A Legitimate Or Substantial Governmental Interest

The panel opinion identified two substantial government interests for enacting the challenged statute: (1) protecting the privacy of persons charged with traffic offenses; and (2) lessening the danger of solicitor abuse

and maintaining public confidence in the judicial system. (App. pp. 14a-16a).

However, the interest in protecting the privacy rights of persons charged with traffic offenses is illusory. Such persons have no reasonable expectation of privacy where criminal justice records and court proceedings are open to the public. Newspapers can, and do, publish the names of persons charged with traffic offenses. Moreover, even persons who are acquitted or have traffic charges dismissed are expressly prohibited from sealing criminal justice records under C.R.S. § 24-72-308(3)(a).

The United States Supreme Court has twice rejected similar justifications for attempts to prohibit direct mail solicitation. In *Bolger v. Youngs Drug Products, Corp.*, 463 U.S. 60 (1983), the government asserted that the prohibition on the mailing of unsolicited contraceptive advertisements, *inter alia*, shielded "recipients from mail they are likely to find offensive." *Id.*, at p. 71. The Supreme Court found this interest "carries little weight" and went on to strongly reaffirm that offensiveness was not a proper justification for limiting protected speech. *See also, Zauderer*, 471 U.S., at 648 ("That some member of the population might find [attorney] advertising embarrassing or offensive cannot justify suppressing it.").

The Supreme Court also rejected a similar justification in the area of direct mail solicitation by lawyers. In *Shapero v. Kentucky Bar Association*, 486 U.S. 466, at 475-476, the Court rejected the suggestion that solicitation by mail could be considered an invasion of privacy:

> Nor does a targeted letter invade the recipient's privacy any more than does a substantively

> identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery. *Id.*

Moreover, as expressly stated in *Shapero, Id.*, any invasion of privacy occurs when the fact of a person's arrest is revealed to an attorney, *not* when the recipient of a letter is confronted with the fact of discovery. Indeed, the State's asserted interest is truly *de minimis* since all traffic offenders must appear in open court and all court proceedings and records remain open to the public[3].

The panel opinion distinguished *Shapero* on the basis that "[s]olicitors are attempting to discover individuals' legal affairs where such discovery might be most offensive – where it is by those whose purpose it is to use the information for pecuniary gain." (App. pp. 14a-15a) However, this misses the point of *Shapero* that the invasion, if any, occurs when a lawyer actually discovers the legal affairs of a person, whether or not there is any communication to that person.

The narrow and selective manner in which the Colorado statute attempts to further the asserted interest of protecting people's privacy betrays the statute's true focus and its inability to serve the state's asserted interest. The State does not restrict all (or probably even most) possible invasions of a person's privacy. Anyone may

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[3] "[W]hatever rights alleged criminals have to maintain their anonymity pending an adjudication of guilt . . . those rights would seem minimal." *Florida Star v. B.J.F.*, 491 U.S. 524, 545 (1989), (White, J., dissenting).

access the records in question so long as they do not do so with the intention of using the information for solicitation of business for pecuniary gain. The media may peruse and report the records, academicians may employ them in their research, statisticians may gather their contents, curiosity seekers may browse through them in search of titillation, or personal enemies may even extract information from them for malicious (yet otherwise lawful) purposes. Only entities intending to use the names and addresses contained in the public records to solicit those people for commercial purposes are denied access. The restriction's exceedingly narrow scope betrays it as a statute designed not to protect privacy but, instead, to prevent solicitation. As *Shapero* teaches, a person's privacy is not infringed by the solicitation, but by the solicitor's discovery of the information that leads to the solicitation.

As such, the challenged statute fails to protect any person's privacy. Nothing prevents an attorney or alcohol rehabilitation center from obtaining the names and addresses of persons charged with crimes and sending them sympathy cards even though it would invade a recipient's privacy to the same extent as a solicitation letter. Both communicate to the recipient that an attorney has learned of his or her plight.

The only other substantial government interest offered in the panel opinion for the restriction on the use of public records is to guard against solicitor abuse and maintain public confidence in the judicial system. However, the State offered no support for these purposes or even articulated these interests in a clear manner. Petitioners' letters to prospective clients maintain public

access to the judicial system by providing a valuable resource to persons charged with traffic offenses. Even if recipients only read the letter and toss it in the waste basket, they may know more about their legal rights and options than they did before. Indeed, the Supreme Court has recognized that advertising for legal services in connection with traffic offenses not only implicates " 'a substantial individual and societal interest' in the free flow of commercial information," but also relates to matters where a person has constitutional rights including the right to select an attorney of his or her own choice in a criminal case. *Bolger v. Youngs Drug Products Corp.*, 463 U.S., at 69.

C.R.S. § 24-72-305.5 denies the public the right to receive commercial speech when that speech derives from certain public records. Based on unequivocal statements of this court, the asserted interest of protecting the privacy rights of persons charged with traffic offenses is inadequate to justify a broad restriction on protected commercial speech.

D. The Challenged Statute Wholly Fails To "Directly Advance" The Purported Government Interest Of Protecting The Privacy Right Of Persons Charged With Traffic Offenses

In order for a restriction on commercial speech to be valid, the prohibition on the use of public records for "the solicitation of business for pecuniary gain" must "directly advance" the government's asserted interest. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S., at p. 566. In order for legislation to

"directly advance" the government's end, there must be an "immediate connection" between the prohibition and the asserted interest. *Id.*, at p. 569. If the means-end connection is "tenuous" or "highly speculative", the regulation cannot withstand constitutional scrutiny. *Id.*; *See also, Adolph Coors Co. v. Brady*, 944 F.2d 1543 (10th Cir. 1991). Thus, the "directly advance" prong of the *Central Hudson* analysis "compels a reviewing court to assess whether legislative ends are served by the legislative means . . . " *Adolph Coors Co. v. Brady*, 944 F.2d, at 1551. A court "cannot simply assume" that the asserted purpose is directly advanced by the regulation. 944 F.2d, at 1551.

In *Edenfield v. Fane*, 113 S.Ct. 1792 (1993), the Supreme Court struck down a ban on direct solicitation by accountants. The Court determined that the government failed to justify the blanket prohibition on solicitation and held that the prohibition did not serve the "asserted interest in any direct and material way." *Id.* at 1800. The Court noted that the commercial speech analysis "does not permit us to supplement the precise interest put forward by the State with other suppositions." *Id.* at 1798. After evaluating the evidence submitted, the Court determined that the broad prohibition on direct accountant solicitation did not adequately advance the asserted interests of preventing fraud and protecting the profession. *See also, Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994).

The challenged statute is wholly ineffective in advancing the ostensible governmental interest of protecting privacy. Criminal justice records remain open to the public. Newspapers can, and sometimes do, print the names and addresses of persons who are charged with

traffic offenses. Instead of protecting the privacy rights of these individuals, the challenged statute may even encourage and lead to wider dissemination of their names.

In addition, the subjective expectation of those persons that they are entitled to privacy from disclosure of public records is patently unreasonable. As noted in *Shapero*, an invasion of privacy occurs when a lawyer learns of a person's legal affairs, not when the person is confronted with the discovery. As such, the prohibition on the use of such records for the "solicitation of business for pecuniary gain" fails to have any "immediate connection" to protecting the asserted privacy right where the records are open to any person.

E. The Challenged Prohibition On The Use Of Public Records Is Far "More Extensive Than Necessary" To Serve Any Government Interest

Under the final prong of the *Central Hudson* test, the Court must assess whether the absolute prohibition on the use of public records for commercial solicitation is more extensive than necessary to serve the government's interest. In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989), this Court defined the "no more extensive than necessary" standard as "a means narrowly tailored to achieve the desired objective . . . . We require the government goal to be substantial, and the cost to be carefully calculated." *Fox*, "placed the *burden firmly on the government* to demonstrate that restrictions were in proportion to the interest served . . . " *Adolph Coors Co. v. Brady*, 944 F.2d, at 1552 (emphasis added).

Here, the statute places burdens on certain persons on the basis of the content of their speech *after* lawfully obtaining public records. Although the legislative history makes reference only to attorneys, the statute prohibits all persons from *using* public records for "the solicitation of business for pecuniary gain" under penalty of criminal sanction. Indeed, the burden imposed is far greater than the prohibition on direct mail solicitation by lawyers struck down in *Shapero* since it includes any use of criminal justice records by *any* person "proposing a commercial transaction." Moreover, the illusory purpose of protecting the privacy of persons charged with traffic offenses is insignificant in proportion to the broad restrictions placed on all persons using public records. As such, the challenged statute is a far more extensive regulation than necessary to advance the purported government interest.

In *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993), this Court struck down a prohibition on newsracks dispensing "commercial handbills", finding that the City failed to establish a reasonable fit between the city's ends and the means chosen to accomplish those ends. The Court rejected the City's claim that commercial speech has only low value as "seriously underestimate[ing] the value of commercial speech." *Id.*, at 1511.

The fact that the City's prohibition on "commercial newsracks" only partially dealt with the City's concerns was significant. The Court's statement on this point is particularly applicable in the instant case:

> A closer examination of one of the cases we have mentioned, *Bolger v. Youngs Drug Products*, [463 U.S. 60 (1983)] demonstrates the fallacy of

the city's argument that a reasonable fit is established by the mere fact that the entire burden imposed on commercial speech by its newsrack policy may in some small way limit the total number of newsracks on Cincinnati's sidewalks. Here, the city contends that safety concerns and visual blight may be addressed by a prohibition that distinguishes between commercial and non commercial publications that are equally responsible for those problems. In *Bolger*, however, in rejecting the Government's reliance on its interest in protecting the public from "offensive" speech, "[we] specifically declined to recognize a distinction between commercial and non commercial speech that would render this interest a sufficient justification for a prohibition of commercial speech." 463 U.S., at 71-72, (citing *Carey v. Population Services International*, 431 U.S. 678 (1977)). Moreover, the fact that the regulation "provide[d] only the most limited incremental support for the interest asserted," 463 U.S., at 73, – that it achieved only a "marginal degree of protection," *ibid.*, for that interest – supported our holding that the prohibition was invalid. Finally, in *Bolger*, as in this case, the burden on commercial speech was imposed by denying the speaker access to one method of distribution – there the United States mails, and here the placement of newsracks on public property – without interfering with alternative means of access to the audience. As then Justice Rehnquist explained in his separate opinion, that fact did not minimize the significance of the burden:

> "[T]he Postal Service argues that Youngs can communicate with the public otherwise than through the mail. [This argument falls]

> wide of the mark. *A prohibition on the use of the mails is a significant restriction of First Amendment rights. We have noted that ' "[t]he United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is as much a part of free speech as the right to use our tongues." ' Blount v. Rizzi,* 400 U.S. [410] at 416 (1971), quoting *Milwaukee Social Democratic Publishing Co. v. Burleson,* 255 U.S. 407 (1921) (Holmes, J., dissenting)." 463 U.S., at 79-80, (footnote omitted).

> In a similar vein, even if we assume, arguendo, that the city might entirely prohibit the use of newsracks on public property, as long as this avenue of communication remains open, these devices continue to play a significant role in the dissemination of protected speech. (Emphasis added; parallel citations omitted) *City of Cincinnati v. Discovery Network, Inc.* 113 S.Ct., at 1515-1516.

The Court also determined that "because the ban is predicated on the content of the publications distributed by the subject newsracks, it is not a valid time, place, and manner restriction on protected speech," *Id.* at 1517.

As in *Discovery Network,* the challenged Colorado statute imposes a complete prohibition on the use of public records for virtually all types of commercial speech to only partially advance very limited and questionable interests. As stressed in the quote from Justice Rehnquist in *Discovery Network,* once the government places itself in the business of providing avenues of speech, it cannot selectively limit use of those avenues on the basis of the type of protected speech that avenue may

be used for. Here, the challenged statute broadly prohibits the use of information in public records on the basis of the content of speech. Based upon these authorities, a rehearing should be granted in the instant case.

III. THE CHALLENGED STATUTE VIOLATES PETITIONERS' QUALIFIED FIRST AMENDMENT RIGHT OF ACCESS TO PUBLIC COURT RECORDS

Numerous courts have explicitly recognized "[t]he axiom that a common law right exists to inspect and copy judicial records." *United States v. Hickey*, 767 F.2d 705 (10th Cir. 1985). While a court has the power to seal documents, its discretion is not unlimited. *Id.* Here, the challenged statute prohibits all use of public records for commercial solicitation without any exceptions or case by case determination.

Although not specifically set forth in the First Amendment, "the press and general public have a constitutional right of access to criminal trials." *Globe Newspaper Co. v. Supreme Court*, 457 U.S. 596, 603 (1982); *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). Likewise, several circuits have recognized a First Amendment right of access to records submitted in connection with criminal proceedings. *See, Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989); *Associated Press v. United States District Court*, 705 F.2d 1143 (9th Cir. 1983) (documents filed in pretrial proceedings); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) (documents filed in connection with plea and sentencing hearings); *Matter of the New York Times Co.*, 828 F.2d 110 (2nd. Cir. 1987)

(documents filed in connection with pretrial suppression hearings); *United States v. Peters*, 754 F.2d 753 (7th Cir. 1985) (trial exhibits); *United States v. Smith*, 776 F.2d 1104 (3rd Cir. 1985) (bill of particulars); *In re Search Warrant for Secretarial Area-Gunn*, 855 F.2d 569 (8th Cir. 1988) (documents filed in support of search warrant applications).

In deciding whether the public has a First Amendment right of access, the Supreme Court has made two inquiries: (1) "whether the place and process have historically been open to the press and general public"; and (2) "Whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 8 (1986).

The panel opinion recognized that "[t]he Colorado legislature in the face of a long common law history of presumed access to court records and a larger statutory scheme that allows for such access, singled out a subgroup for denial of access based on speech content." (App. p. 13a) Notwithstanding these facts, the panel determined that the *Press-Enterprise* test did not support a right of access to criminal justice records.

The panel's opinion overlooked the historic and practical reasons existing to justify the First Amendment right of access to judicial records. In reaching its holding, the panel recognized the established common law right of access to judicial records, but determined that access to criminal justice records to use for commercial solicitation was not supported by any tradition of accessibility and did not play any positive role in the judicial process. (App. pp. 8a-10a) However, as forcefully articulated in

Judge Aldisert's dissent, there is, in fact, a national tradition of access to these records which serves "an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Richmond Newspaper*, 448 U.S., at 571. Moreover, constitutionally protected "[d]irect [mail] solicitation for clients may result in the legal representation for individuals charged with offenses that may place liberty and property interests at risk, including the possible loss of automobile operation privileges." (App. p. 24a). None of the purposes advanced by the state is substantial enough to justify this content-based prohibition on the use of records open to the general public.

IV. THE CHALLENGED STATUTE VIOLATES THE EQUAL PROTECTION CLAUSE

C.R.S. § 24-72-305.5 bans the use of judicial records for commercial speech for "the direct solicitation of business for pecuniary gain." But "the Government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker." *Simon & Shuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S.Ct. 501, 509 (1992). And "exemptions from a law regulating speech may diminish the credibility of the government rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 114 S.Ct. 2038, at 2044 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct., at 1511-1515.

The challenged statute does not include non-profit solicitations or the publication of such information in the news media. The absurdity of permitting such broad

exceptions to a law purportedly enacted to protect privacy needs no elaboration. Privacy is not even rationally related to C.R.S. § 24-72-305.5. It certainly could not withstand intermediate or strict scrutiny.

Moreover, nothing in the challenged statute prohibits those who are exempt under the law from selling or giving to others not exempted the very reports in question. Having obtained them by another's exemption, anyone otherwise banned could use them for commercial solicitation to persons identified in the reports. Thus, the exceptions swallow the purported purpose of the rule. "Lawful" collectors of data could start a cottage industry selling these reports to others.

C.R.S. § 24-72-305.5 allows the use of judicial records for some types of commercial speech but not others. This smacks of viewpoint discrimination by the State, a constitutionally indefensible form of speech regulation. *R.A.V. v. City of St. Paul, Minnesota*, 112 S.Ct. 2538, 2547 (1992). On the other hand, the Supreme Court has, on a few occasions "fused the First Amendment into the Equal Protection Analysis . . . but . . . with the acknowledgment . . . that the First Amendment underlines its analysis." *R.A.V.* 112 S.Ct., at 2544 n.4. If C.R.S. § 24-72-305.5 cannot survive under the First Amendment, it cannot survive under the Fourteenth.

CONCLUSION

Based upon the direct conflict between the Tenth Circuit opinion in the instant case and the decision in *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th

Cir. 1993) and *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994), certiorari should be granted to resolve this conflict between federal appellate courts. Moreover, the panel opinion in the instant case is in direct conflict with the recent unequivocal decisions of this Court in the area of Commercial speech and presents questions of significant importance in this area. For all of these reasons this Court should grant certiorari in this case.

Respectfully submitted,

GREGORY S. LANPHERE
JOEL E. URBANIAK

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LANPHERE & URBANIAK, THE LAW FIRM OF, GREGORY S. LANPHERE, JOEL E. URBANIAK, individually and as partners thereof; FRANK MUTCHLER, as Director of Turning Point Drug and Alcohol Treatment Center,	)	No. 92-1363
Plaintiffs - Appellants,	)	
v.	)	
COLORADO, STATE OF; GALE A. NORTON, Attorney General for the State of Colorado, in her official capacity only; ROY ROMER, Governor for the State of Colorado, in his official capacity only,	)	
Defendants - Appellees.	)	

ORDER
Entered July 1, 1994

Before TACHA, SETH, ALDISERT*, Circuit Judges.

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*Honorable Ruggero J. Aldisert, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc. Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ Illegible
Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LANPHERE & URBANIAK, THE LAW FIRM OF, GREGORY S. LANPHERE, JOEL E. URBANIAK, individually and as partners thereof; FRANK MUTCHLER, as Director of Turning Point Drug and Alcohol Treatment Center,	)	No. 92-1363
Plaintiffs-Appellants,	)	
v.	)	
COLORADO, STATE OF; GALE A. NORTON, Attorney General for the State of Colorado, in her official capacity only; ROY ROMER, Governor for the State of Colorado, in his official capacity only,	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 92-Z-1200)

(Filed Apr. 19, 1994)

Michael W. Gross (Arthur M. Schwartz, of Arthur M. Schwartz, P.C., Denver, Colorado, with him on the briefs),

of Arthur M. Schwartz, P.C., Denver, Colorado, for the Plaintiffs-Appellants.

Mark Widmann Gerganoff (Gale A. Norton, Attorney General; Raymond T. Slaughter, Chief Deputy Attorney General; Timothy M. Tymkovich, Solicitor General; Maurice G. Knaizer, Deputy Attorney General; Larry A. Williams, First Assistant Attorney General, Denver, Colorado with him on the brief), Assistant Attorney General, Denver, Colorado, for the Defendants-Appellees.

Before TACHA, SETH, and ALDISERT,* Circuit Judges.

TACHA, Circuit Judge.

Plaintiffs brought suit against the State of Colorado under 42 U.S.C. § 1983 claiming a violation of their First and Fourteenth Amendment free speech rights and requesting injunctive relief. Plaintiffs' claims are the result of a Colorado state statute limiting public access to criminal justice and official action records containing individual names, addresses, and telephone numbers where access is sought for the purpose of directly soliciting business for pecuniary gain. The district court granted summary judgment for defendant. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

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* The Honorable Ruggero J. Aldisert, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

I. Background

The facts relevant to this appeal are not in dispute. Plaintiffs Gregory S. Lanphere and Joel E. Urbaniak are partners in the law firm of Lanphere & Urbaniak in Colorado Springs, Colorado. The firm handles misdemeanor traffic cases and cases involving charges of driving under the influence of alcohol (DUI). Plaintiff Frank Mutchler is the director of the Turning Point Drug and Alcohol Treatment Center, also located in Colorado Springs. Prior to June 1992, plaintiffs obtained names and addresses of individuals facing prosecution for various traffic violations and DUI from criminal justice and official action records[1] for the purpose of engaging in direct mail solicitation and advertising.

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[1] We use the terms "criminal justice records" and records of "official action" as they are defined by Colorado statute:

> (4) "Criminal justice records" means all books, papers, cards, photographs, tapes, recordings, or other documentary materials, regardless of form or characteristics, which are made, maintained, or kept by any criminal justice agency [also defined by statute as shown below] in the state for use in the exercise of functions required or authorized by law or administrative rule.
>
> . . . .
>
> (7) "Official action" means an arrest; indictment; charging by information; disposition; pretrial or posttrial release from custody; judicial determination of mental or physical condition; decision to grant, order, or terminate probation, parole, or participation in correctional or rehabilitative programs; and any decision to formally discipline, reclassify, or relocate any person under criminal sentence.

Colo. Rev. Stat. § 24-72-302 (1988). "Criminal justice agency" is defined as follows:

On April 2, 1992, the Colorado legislature passed the following legislative provision:

> 24-72-305.5. Access to records – denial by custodian – use of records to obtain information for solicitation. Records of official actions and criminal justice records and the names, addresses, telephone numbers, and other information in such records shall not be used by any person for the purpose of soliciting business for pecuniary gain. The official custodian shall deny any person access to records of official actions and criminal justice records unless such person signs a statement which affirms that such records shall not be used for the direct solicitation of business for pecuniary gain.

Colo. Rev. Stat. § 24-72-305.5. Since the passage of this section, plaintiffs have been denied access to criminal justice and official action records (collectively referred to hereinafter as "criminal justice records"). They refuse to sign the statement required under § 24-72-305.5 because they wish to use the names and addresses in such records to engage in direct mail advertising "for the purpose of soliciting business for pecuniary gain."

> (3) "Criminal justice agency" means any court with criminal jurisdiction and any agency of the state [, city, or county] which performs any activity directly relating to the detection or investigation of crime; the apprehension, pretrial release, posttrial release, prosecution, correctional supervision, rehabilitation, evaluation, or treatment of accused persons or criminal offenders; or criminal identification activities or the collection, storage, or dissemination of arrest and criminal records information.

Id.

Plaintiffs brought suit against the State of Colorado in the United States District Court for the District of Colorado alleging a violation of their First and Fourteenth Amendment right to free speech. The district court granted summary judgment for defendant holding that there is no right of access to criminal justice records and that, even if the First Amendment is implicated, the statute at issue survives First Amendment review. Plaintiffs now appeal.

II. Plaintiffs' First Amendment Claim

We review a district court's grant of summary judgment de novo, employing the same standard employed by the district court. *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991). "[S]ummary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Id.* Because the essential facts are undisputed in this case, we face exclusively a question of law.

Plaintiffs assert that § 24-72-305.5 is an impermissible limitation on their First Amendment free speech rights. They argue that, because access to records is conditioned upon whether the resulting speech is to be commercial in nature, the regulation is content-based and should be subject to review under a First Amendment framework. Under this framework, plaintiffs argue that § 24-72-305.5 is unconstitutional.

The State of Colorado, on the other hand, contends that this is not a free speech case at all, but rather a simple access-to-records case. Under this framework, the First Amendment is not implicated. The state has wide

discretion in determining access to government records such as those sought by plaintiffs here and, the State of Colorado argues, § 24-72-305.5 is a proper exercise of that discretion. The case is not as clear-cut as either side urges.

A. Access to government records

Courts have historically recognized a common law right, though not an absolute right, of access to government records, including judicial records. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978); *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir.), *cert. denied sub nom., Hopkinson v. United States*, 474 U.S. 1022 (1985). This "right is an important aspect of the overriding concern with preserving the integrity of the law enforcement and judicial processes." *Id.* However, in this case, the common law has been supplanted by the statutory scheme outlined in Colo. Rev. Stat. §§ 24-72-301 through 24-72-308, which includes the limiting provision challenged by plaintiffs.

The question, then, is whether there is an overriding constitutional right of access to government records. The State of Colorado is correct in its assertion that the general answer to this question is that there is no constitutional right, and specifically no First Amendment right, of access to government records. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (pointing out that the Court "has never intimated a First Amendment guarantee of a right of access to all sources of information within government control"); *Hickey*, 767 F.2d at 709. This principle encompasses situations in which members of the general public

and the press seek access to criminal justice records. *See Nixon*, 435 U.S. at 609; *Hickey*, 767 F.2d at 709. Any reference in Supreme Court precedent to constitutional entitlement of the public to information held by the government "mean[s] no more than that the government cannot restrain communication of whatever information [is in fact acquired]." *Houchins*, 438 U.S. at 10. *Houchins* makes clear the reasoning behind this rule. "The Constitution . . . establishes the contest, not its resolution. [A legislature] may provide a resolution . . . through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society." *Id.* at 14-15 (quoting Hon. Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 636 (1975)).

Plaintiffs suggest, however, that we derive a First Amendment right of access from another line of Supreme Court precedent. In several cases, the Court has held that in certain circumstances the First Amendment is implicated in relation to the Sixth Amendment right to a fair and public trial. *See Press-Enterprise Co. v. Superior Court* (Press-Enterprise II), 478 U.S. 1 (1986) (finding a right of access to pre-trial criminal proceedings as conducted in California); *Press-Enterprise v. Superior Court* (Press-Enterprise I), 464 U.S. 501 (1984) (finding a right of public access to a jury voir dire proceeding in a criminal trial); *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596 (1982) (finding a right of public access to a criminal trial); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (also involving public access to a criminal trial). Under this precedent, however, a First Amendment right of access inheres only in limited situations where "a tradition of

accessibility implies the favorable judgment of experience[]," *Press-Enterprise II*, 478 U.S. at 8 (internal quotations omitted), and where "public access plays a significant positive role in the functioning of the particular process in question." *Id.* To hold that these principles provide for access to any criminal justice record which happens to contain a defendant's address and/or phone number and which is sought for that reason alone would stretch them well beyond their current bounds. *See Calder v. IRS*, 890 F.2d 781 (5th Cir. 1989) (holding that the First Amendment right of access to certain criminal proceedings does not extend to IRS records of its investigation of Al Capone sought by a university professor who wished to use the records in his research). We therefore decline to so hold.

The State of Colorado argues that this is where our inquiry ends. In light of the specific statutory scheme involved in this case, we disagree.

B. First Amendment application

We begin here by noting once again that there is no general First Amendment right in the public to access criminal justice records. However, though the Colorado Legislature theoretically has the power to deny access entirely, the First Amendment can be implicated by the line drawing in Colorado's access-to-records statute. As the Supreme Court said in *Sherbert v. Verner*, 374 U.S. 398 (1963), a statute may not be "saved from constitutional infirmity on the ground that [what is involved is] not [plaintiffs'] 'right' but merely a 'privilege.' It is too late in

the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or a privilege." *Id.* at 404; *see also City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (holding that, even assuming the city of Cincinnati could entirely prohibit the use of newsracks on public property, as long as they are permitted, a content-based regulation of newsracks is subject to First Amendment scrutiny); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (despite the government's broad power to set tax policy, holding unconstitutional a state sales tax scheme conditioning exemption on publication content).

In this case, a particular facet of Colorado's statutory scheme does indeed evoke the First Amendment. Although criminal justice records themselves do not constitute speech, the Colorado Legislature has drawn a regulatory line based on the speech use of such records. Section 24-72-305.5 disallows the release of records to those wishing to use them for commercial speech, while allowing the release of the same records to those having a noncommercial purpose. Because commercial speech is protected under the First Amendment (though it is accorded lesser protection than "core" First Amendment speech), *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 560-566 (1980), and because such speech includes direct mail solicitation, *Shapero v. Kentucky Bar Ass'n*, 485 U.S. 466 (1988), what we have in the end is a content-based restriction on protected speech. *See Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537-38 (1980) ("The First Amendment's hostility to content-

based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.").

C. Review under *Central Hudson*

Having determined that § 24-72-305.5 does in fact implicate the First Amendment[2], *accord Moore v. Morales,*

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[2] One additional point, important to constitutional line drawing, bears brief mention under the facts of this case. It could be argued that what we have here is not a case of a government obstruction to speech but rather a government refusal to aid in certain speech. Thus, the case might appear to resemble *Rust v. Sullivan,* 111 S. Ct. 1759 (1991).

In *Rust,* the Supreme Court upheld a regulation prohibiting workers in projects receiving funding under Title X of the Public Health Service Act from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning. In rejecting plaintiffs' First Amendment challenge, the Court said that "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing these goals necessarily discourages alternate goals, would render numerous government programs constitutionally suspect." *Id.* at 1773. In *Lyng v. International Union,* 485 U.S. 360 (1988) (upholding food stamp statute precluding a household from becoming eligible for food stamps if a member of the household is on strike), the Court said further that "even where the Constitution prohibits coercive governmental interference with specific individual rights, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom." *Id.* at 369 (internal quotations omitted); *see also Regan v. Taxation With Representation of Washington,* 461 U.S. 540, 543-547 (1983) (upholding tax exemption for nonprofit organizations conditioned on an organization's not engaging in significant lobbying activities).

No. CIV.A. H-93-2170, 1994 WL 14570, at *7 (S.D. Tex. Jan. 19, 1994) (holding that a Texas statute limiting access to accident reports was subject to First Amendment review), we proceed to review it in that light. Because the statute disadvantages commercial speech, our review is conducted subject to the lesser First Amendment protection afforded such speech under the four-part test of *Central Hudson:*

> [1)] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2)] Next, we ask whether the asserted governmental interest is substantial. [3)] If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and [4)] whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566; *see Adolph Coors Co. v. Brady,* 944 F.2d 1543, 1546-47 (10th Cir. 1991).

In reality, however, this case differs significantly from *Rust* and related cases. With Colo. Rev. Stat. § 24-72-305.5, we have less an instance of "the Government refusing to fund [or in this case otherwise aid in] activities, including speech, which are specifically excluded from the scope of [a] project," *Rust* at 1773, and more a "case of a general law singling out a disfavored group on the basis of speech content," *id.* The Colorado Legislature has, in the face of a long common law history of presumed access to court records and a larger statutory scheme that allows for such access, singled out a subgroup for denial of access based on speech content. Section 24-72-305.5 more resembles a government erected obstruction to speech than a legislative decision not to encourage certain speech in the process of pursuing other goals.

First, the speech affected under § 24-72-305.5 comes within the protection of the First Amendment because the direct mail advertising in this case concerns lawful activity and because all commercial solicitations made possible by access to records, and not merely misleading solicitations, are affected. Further, the State does not allege that plaintiffs' particular solicitations would necessarily be misleading. Thus we move on to prong two of the *Central Hudson* test.

Under prong two, the substantial interest asserted by the State before the district court was the need to protect the privacy of those charged with misdemeanor traffic offense and DUI. In *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), the Supreme Court found no sufficient privacy interest in a ban on targeted direct mail solicitation. *Id.* at 476. This finding, however, was based partially on the nature of a solicitation ban which suppresses speech based on information already in the possession of solicitors. The Court said that "[t]he [privacy] invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery." *Id.* The case at issue involves just that sort of invasion. Solicitors are attempting to discover individuals' legal affairs[3] where such discovery might be most

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[3] It is important to remember that the information at issue concerns not convicted individuals but merely accused individuals. With respect to accused individuals, the analysis changes where the right of access to trial proceedings derived from the First and/or Sixth amendments is implicated. As we have already ruled in Section II.A. above, the constitutional right of access to trial proceedings is not a consideration in this case.

offensive – where it is by those whose purpose it is to use the information for pecuniary gain.

Plaintiffs contend that the State's asserted privacy interest is only chimerical because the identity of those charged may be available through other sources such as local newspaper. However, even if the information is available to some degree through other sources, the state's interest in not aiding in the dissemination of the information for commercial purposes remains. We presume that plaintiffs would not be involved in this litigation if the information they seek is so widely available that the privacy of the accused is no longer at issue. Thus, in this case we agree with the State that privacy considerations constitute a substantial state interest.

Plaintiffs further contend, however, that the privacy interest asserted by the State is merely a creation for this litigation. In support of this contention plaintiffs cite the very limited legislative history of the statute. Plaintiffs point out that State Senator Wells, in introducing the amendment that became § 24-72-305.5, said: "We were not [providing access to records] to . . . provide a client base . . . for people to go out and solicit new business and . . . so what this does is it . . . says that those records are still open but are not to be used in direct solicitation for pecuniary gain. . . . " Tape recording of Colorado Senate debate on amendment to H.B. 1078. This quotation is part of a statement consisting of only 22 transcript lines. It is essentially a summary description of what the amendment does. It is not a definitive statement on the State's interest in § 24-72-305.5 and is not inconsistent with the State's asserted interest in protecting privacy.

The statement by Senator Wells does, however, suggest a further substantial state interest in this case – lessening the danger of solicitor abuse and, relatedly, maintaining public confidence in our system of justice.[4] These are also substantial state interests. *See Shapero*, 486 U.S. at 476 (commenting that the state can regulate based on the potential abuses of direct mail advertising, though not in the form of a total ban on that mode of speech; *In re R.M.J.*, 455 U.S. 191, 202 (1982) discussing state interest in regulating demonstrably *or potentially* misleading advertising); *In re Anis*, 599 A.2d 1265, 1269-71 (N.J.) (discussing some of the problems associated with attorney direct mail solicitation), *cert. denied*, 112 S. Ct. 2303 (1992); *see also Shapero*, 486 U.S. at 480-491 (O'Connor, J., joined by Rehnquist, C.J. and Scalia, J., dissenting).

Turning to the third prong of *Central Hudson*, we have no trouble finding that § 24-72-305.5 advances the state's interests in a reasonably direct way. The State's interest in protecting privacy is directly advanced when the State no longer allows access to the names and addresses of those charged with misdemeanor traffic violations and DUI. Further refusing access to such information reasonably directly advances the State's interest in lessening the danger of overreaching by solicitors where potential solicitation recipients may be particularly vulnerable.

It is under the fourth prong of *Central Hudson* that we find our primary inquiry. This prong, which asks

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[4] The State's concern over misconduct and decreased confidence in the justice system applies whether the solicitor for pecuniary gain is an attorney or a non-attorney.

"whether [the regulation] is not more extensive than is necessary to serve [the state] interest," *Central Hudson*, 447 U.S. at 566, is not a "least restrictive means test." *Board of Trustees of State Univ. v. Fox*, 492 U.S. 469, 476-481 (1989). Instead, we must determine whether the regulation constitutes a "reasonable fit" in light of the interest asserted by the State. *Id.*

We have already determined above that the State has substantial interests in this case and that § 24-72-305.5 advances these interests in a reasonably direct way. Balancing these determinations against the effect of § 24-72-305.5 on commercial speech, does the statute effect a "reasonable fit?" We look first to *Shapero* in making this determination.

In *Shapero* the Supreme Court struck down a Kentucky rule prohibiting attorney direct mail solicitation where solicitation was precipitated by a particular event and directed at a party affected by that event. The Court focused on the fact that the ban was designed to completely cut off such solicitation when lesser measures, such as previewing individual mailings to ensure that they are not misleading and do not exert undue influence, were more appropriate in light of the value of commercial speech. *Id.* at 476-78. The Court distinguished *Shapero* from *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding a blanket ban on in-person solicitation by attorneys), noting that direct mail solicitation "poses much less a risk of overreaching or undue influence than does in-person solicitation". *Shapero*, 486 U.S. at 472-476 (internal quotations omitted).

Though this is a direct mail solicitation case, it is not *Shapero*. Significant distinguishing elements here tip the balance in favor of the State despite the lower risk of overreaching with direct mail versus in-person solicitation. First, in this case we have the added interest in protecting privacy, not present in *Shapero* where solicitors presumably already possessed the information necessary to solicit). More importantly, the State of Colorado has not completely banned direct mail solicitation for pecuniary gain of any particular group. The State has instead established an indirect barrier to commercial speech by not making certain records available for that purpose.[5] As

---

[5] The fact that § 24-72-305.5 only indirectly burdens speech does not render the First Amendment inapplicable. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (striking down state unemployment regulation that had the effect of denying benefits to members of a certain religion saying that "[i]f the purpose or effect of a law is to . . . discriminate . . . , that law is constitutionally invalid even though the burden may be characterized as being only indirect"); *see also Regan v. Time*, 468 U.S. 641, 648 (1984) (holding that, where a regulation is not content neutral, even if it would otherwise qualify as a restriction merely on the time, place, or manner of speech – which can be seen as an indirect restriction – it does not qualify for more lenient time, place, and manner review); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (holding unconstitutional a regulation prohibiting street newsracks for commercial handbills while continuing to allow them for other publications such as ordinary newspapers).

We are mindful of the Supreme Court's admonition in *Zemel v. Rusk*, 381 U.S. 1 (1965) (rejecting First Amendment challenge to a blanket ban on travel to Cuba), that "there are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." *Id.* at 16-17. However, in this case, unlike *Zemel*, the information restriction is expressly based on the content of the end expression.

a result, the "reasonable fit" test of *Fox* is more easily satisfied. *See Shapero*, 486 U.S. at 476 (stating that the risk of abuse does not justify a *total ban* on direct mail solicitation in part because "[t]he State can regulate such abuses through far less restrictive . . . means"); *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 310 (1981) (White, J., dissenting). In addition, in this case the State is not required to provide access to criminal justice records at all. While this does not render the First Amendment inapplicable (as discussed above) it is relevant to determining whether the State's regulation is a reasonable fit. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (stating that because access to information in the discovery process is "a matter of legislative grace," some continued control over that information by the court does not raise the same specter of government censorship that such control might [otherwise] suggest").

For these reasons, this case stands in contrast to *Shapero*. Section 24-72-305.5 constitutes a "reasonable fit" in advancing the State of Colorado's substantial interest in protecting privacy and avoiding abuse in direct mail solicitation for pecuniary gain.

III. Conclusion

We find that, though Colo. Rev. Stat. § 24-72-305.5 is a content-based restriction on commercial speech, it is valid under the *Central Hudson* framework. The district court's grant of summary judgment for defendant is **AFFIRMED.**

Lanphere & Urbaniak v. Colorado, No. 92-1363
Aldisert, Circuit Judge, dissenting.

I would reverse the judgment of the district court and hold that the Colorado statute offends the First Amendment right of access to criminal proceedings. I believe that this case is governed by the teachings of *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (hereinafter *Press-Enterprise II*):

> In cases dealing with the claim of a First Amendment right of access to criminal proceedings, our decisions have emphasized two complementary considerations. First, because a " 'tradition of accessibility implies the favorable judgment of experience,' *Globe Newspaper [Co. v. Superior Court]*, 457 U.S. [596], at 605 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (BRENNAN, J., concurring in judgment)), we have considered whether the place and process have historically been open to the press and general public. . . .
>
> Second, . . . the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question.

Although it is true that the "Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control," *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (Burger, C.J., plurality opinion), when it comes to criminal proceedings, "[i]f the particular proceeding in question passes . . . tests of experience and logic, a qualified First Amendment right of public access attaches. *Press-Enterprise II*, 478 U.S. at 9.

In order to determine if the Colorado Criminal Justice Records Act, Colo. Rev. Stat. § 24-72-305.5, is constitutional, we must examine the records to which it bars access under a three-part inquiry: (a) whether "criminal justice records" and "official actions" are part of "criminal proceedings," (b) whether national experience provides for public access to such records and (c) whether access by the public plays a significantly positive role in the functioning of the process in question. *See Press-Enterprise II*, 478 U.S. at 8 *Globe Newspaper*, 457 U.S. at 605-06.

In my view, we must answer all three questions in the affirmative.

I.

To ask the first question is also to answer it. The Colorado statute clearly precludes access to "[r]ecords of official actions and criminal justice records" to certain individuals. Colo. Rev. Stat. § 24-72-305.5. "Criminal justice records" clearly refer to the records of criminal prosecutions. The statute's definition of "official action" covers all aspects of criminal proceedings:

> "Official action" means an arrest; indictment; charging by information; disposition; pretrial or posttrial release from custody; judicial determination of mental or physical condition; decision to grant, order, or terminate probation, parole, or participation in correctional or rehabilitative programs; and any decision to formally discipline, reclassify or relocate any person under criminal sentence."

Colo. Rev. Stat. § 24-72-302(7).

There can be no question that Colo. Rev. Stat. § 24-72-305.5 relates to the records of criminal proceedings.

II.

We must next examine the experience prong of our three-part inquiry. In *El Vocero De Puerto Rico v. Puerto Rico*, 113 S. Ct. 2004, 2006 (1993), the Court held that "the 'experience' test of *Globe Newspaper* does not look to the particular practice of any one jurisdiction, but instead 'to the experience in that type or kind of hearing throughout the United States.' " (citing *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 323 (1st Cir. 1992)). In *Press-Enterprise II*, 478 U.S. at 11, the Court established that "[o]pen preliminary hearings . . . have been accorded 'the favorable judgment of experience.' " (citing *Globe Newspaper*, 457 U.S. at 605). The records at issue here, by and large relate to preliminary proceedings. Furthermore, this court "acknowledged the axiom that a common law right exists to inspect and copy judicial records." *United States v. Hickey*, 767 F.2d 705, 708 10th Cir.), *cert. denied sub nom. Hopkinson v. United States*, 474 U.S. 1022 (1985). As Colorado notes in its brief, "prior to the passage of the Colorado Criminal Justice Act records were released pursuant to a common law . . . obligation to do so." Brief of Appellee at 7 n.3. Although the Colorado experience is not dispositive, it is indicative of the "national tradition" of access to these records. *See United States v. Suares*, 880 F.2d 626, 630 (2d Cir. 1989) (recognizing a presumption of public access to a criminal trial and to documents filed in connection with criminal proceedings). Accordingly, the right to access contention meets the test of "experience."

III.

We must now inquire into the last prong: What value, if any, does public access to the State's criminal justice records add to the judicial process? Whether access is available to appellants through a qualified First Amendment right depends on "whether public access . . . plays a particularly significant positive role in the actual functioning of the process." *Press-Enterprise II*, 478 U.S. at 11.

In general, "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Richmond Newspapers*, 448 U.S. at 571.

A.

Here, however, only a specific sector of society has been denied access to Colorado's criminal justice records. One Appellant, Lanphere & Urbaniak, is a Colorado Springs law firm, which handles many cases involving misdemeanor traffic offenses and driving under the influence of alcohol cases. The remaining Appellant, Frank Mutchler, directs the Turning Point Drug and Alcohol Treatment Center, also located in Colorado Springs. Prior to June 1992, the effective date of the statute, Appellants used El Paso County Court records to obtain the names and addresses of individuals being prosecuted for driving under the influence and other traffic violations. The information was used for direct mail solicitation and advertising. The statute now prohibits the use of El Paso County Court records for "the purpose of soliciting business for pecuniary gain." Colo. Rev. Stat. § 24-72-305.5.

Colorado argues that Appellants' solicitations for pecuniary gain provide no significant value to the court processes.

B.

Notwithstanding the State's attempt to characterize the Appellants' behavior as unsavory, direct mail advertising by lawyers is a constitutionally protected activity. *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 472 (1988) ("Lawyer advertising is in the category of constitutionally protected commercial speech."). No suggestion has been made that solicitation of candidates for alcohol rehabilitation is prohibited. We must look beyond any personal distaste for direct solicitation and, instead, look to the value these professionals provide to our legal system.

We have long recognized the value of legal representation in criminal proceedings. *See Gideon v. Wainwright,* 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."). Direct solicitation for clients may result in legal representation for individuals charged with offenses that may place liberty and property interests at risk, including the possible loss of automobile operation privileges. I believe that this plays a particularly significant positive role in the actual functioning of the judicial process. In addition, the attorney Appellants argue that direct mail solicitation serves an educational purpose because is informs members of the public of their rights in traffic court proceedings.

Lawyers are not the only professionals prevented from soliciting. Health care providers such as Mr. Mutchler may not solicit clients for their treatment centers. Treatment of alcohol abuse benefits the justice system by attempting to limit the number of repeat offenders.

Therefore, not only does public access provide significant value in this instance, but it is value that goes to the very heart of our judicial system.

IV.

Under the Court's three-pronged analysis, a qualified First Amendment right of access attaches to the criminal justice records regulated by the state of Colorado. Therefore, in order to close those records to all or part of the public, there must be a compelling state interest in closure and a carefully tailored resolution of the conflict between that interest and First Amendment concerns. *Globe Newspaper,* 457 U.S. at 606-07.

The State suggests at least three compelling interests in closing the criminal justice records to the Appellants: (1) affording the individuals named in the records greater control over the information the State has concerning them, thereby preserving the right to privacy, (2) adhering to the original, intended uses of the records, namely the administration of justice and law enforcement and (3) eliminating the offensiveness of seeking monetary gain from another's misfortune with the State's assistance.

In the context of First Amendment analysis, I find none of these arguments persuasive. Upon close scrutiny the State's interests are far from "compelling."

A.

Colorado concedes that all of the information denied to Appellants by the statute is accessible to them through the El Paso County News, the official weekly newspaper for El Paso County, Colorado. The State's interest in preserving the right of privacy of those arrested for driving under the influence is not so compelling that they have attempted to prohibit the publication of the names of these individuals in the El Paso County News. No citation is necessary to indicate that any attempt to prevent publication of this information by the news media would be a violation of prior restraint precepts of the First Amendment. The statute is far too underinclusive to protect the privacy interest of those arrested for this offense.

B.

Colorado contends that by precluding the dissemination of names and addresses, fealty is being paid to the "original, intended uses of the records, namely, the administration of justice and law enforcement." Brief of Appellee at 29-30. I believe that this is an incomplete statement of the purpose of public records. As this court has previously made clear, the right to inspect and copy judicial records "is an important aspect of the overriding concern with preserving the integrity of the law enforcement and the judicial processes." *Hickey*, 767 F.2d at 708

(citing *United States v. Hubbard*, 650 F.2d 293, 315 (D.C. Cir. 1980)). To be sure, the interests of law enforcement must always be paramount, but those interests may never be interpreted as superior to or towering over the rights of those accused of a crime.

C.

In describing its third compelling interest in defense of the statute, Colorado makes the following engrossing statement:

> Eliminating the offensiveness of seeking monetary gain from another's misfortune with the State's assistance. It is the State's function and duty to administer justice and enforce the law. It is not the State's function or duty to provide a client base to private organizations seeking monetary gain.

Brief of Appellee at 30.

Even if the solicitation of clients by lawyers or alcoholic rehabilitation programs, a constitutionally protected activity, is to be considered offensive conduct, the offensive nature of such activities has been found by the Supreme Court to be an insufficiently compelling reason to abridge the public's First Amendment rights. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983) ("At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression.") (quoting *Carey v. Population Serv. Int'l*, 431 U.S. 678, 701 (1977)).

In a First Amendment analysis, the issue is not whether Appellants have access to a client base for monetary gain, but whether the State has the power to place off limits to certain sectors of society records which hitherto have been open to all. As I read the teachings of the Supreme Court, so long as direct mail solicitation is "not false or deceptive and does not concern unlawful activities," *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985), it will be permitted and that the First Amendment right of public access to criminal proceedings applies to the public as a whole, without regard to the lawful use of the information gained through that access. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurances that established procedures are being followed and that deviations will become known."). It would be disingenuous to recognize as a compelling state interest the indirect regulation of that which the State clearly cannot directly regulate. *See Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (holding that Florida's ban on in-person solicitation by Certified Public Accountants violated the First Amendment); *see also Zauderer*, 471 U.S. at 638.

Thus, the issue is not whether Colorado is obliged to provide a client base to the Appellants or required to furnish a source of news to El Paso County News. Rather, the question is to what extent may it deny public access, irrespective of the motivation for the access, so long as the motivation is not for an unlawful purpose. In my view, a desire for pecuniary gain in the world's strongest

capitalistic society operating under a democratic political system has not yet been declared unlawful, offensive or unconstitutional.

V.

Therefore, I believe that Appellants possess a qualified First Amendment right of access to the records, which has been denied them by the Colorado statute. I would hold that the statute is unconstitutional and would reverse the judgment of the district court. Accordingly, I dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-Z-1200

THE LAW FIRM OF LANPHERE & URBANIAK; GREGORY S. LANPHERE [sic]; JOEL E. URBANIAK, individually and as partners thereof; and FRANK MUTCHLER, as Director of Turning [sic] Point Drug and Alcohol Treatment Center,

Plaintiffs,

v.

THE STATE OF COLORADO

Defendant.

ORDER OF DISMISSAL
(Filed Nov. 13, 1992)

This matter was before the Court on November 9, 1992, for oral argument on plaintiffs' Motion For Preliminary Injunction, Plaintiffs' Motion For Summary Judgment Pursuant To F.R.C.P. 56, and the State's Motion For Summary Judgment. The Court heard the arguments and statements of counsel and made oral conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that plaintiffs' Motion For Preliminary Injunction is denied. It is

FURTHER ORDERED that Plaintiffs' Motion For Summary Judgment Pursuant To F.R.C.P. 56 is denied. It is

FURTHER ORDERED that the State's Motion For Summary Judgment is granted, and the Complaint, First Amended Complaint, and cause of action are dismissed with prejudice. It is

FURTHER ORDERED that the parties shall pay their own costs.

DATED at Denver, Colorado, this 13th day of November, 1992.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK, Judge
United States District Court

November 13, 1992

Civil Action No. 92-Z-1200

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of ORDER OF DISMISSAL entered by Judge Zita L. Weinshienk and filed on November 13, 1992, were mailed to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-Z-1200

THE LAW FIRM OF LANPHERE & URBANIAK, et al.,

Plaintiffs,

vs.

THE STATE OF COLORADO, et al.,

Defendants.

REPORTER'S TRANSCRIPT
(Hearing on Motions)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 8:50 a.m., on the 9th day of November, 1992, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

ARTHUR M. SCHWARTZ, BRADLEY J. REICH, and MICHAEL W. GROSS, Attorneys at Law, 600 17th Street, Suite 2250S, Denver, Colorado, 80202, appearing for the plaintiffs.

MARK W. GERGANOFF, Assistant Colorado Attorney General, 110 16th Street, 10th Floor, Denver, Colorado, 80202, appearing for the defendants.

* * *

[p. 31] **RULING**

THE COURT: The first concern of the Court is whether we really have a constitutional issue here; and Defendant argues very persuasively that the State does, indeed, have a right to refrain from speaking or from giving this information. The State cannot be compelled to disseminate these criminal justice records. And *Oklahoma Hospital* [Association v. Oklahoma Publishing Co.], which has been cited by both sides, 748 F.2d 1421, a 1984 Tenth Circuit case, does indeed support the defendant's argument that the State may [p. 32] condition access to these records as they indeed have done.

In the absent [sic] of the Colorado Criminal Justice Records Act, it apepars [sic] to this court, and the Court concludes, that Plaintiffs do not have a right, would not have a right in the absence of the statute to view the criminal justice records. The reason they can do so is because under the statute, the State allows them to do so. And the State allows them to do so with conditions and exceptions, as have been pointed out; and one of the exceptions – well, there have been a couple exceptions recently. One, for example this year, is the fact that the name of a victim of sexual assaulte [sic] or of alleged sexual assault shall be deleted from the criminal justice record.

The one we're talking about in this hearing is that these records, records of official action and criminal justice records, etc., shall not be used by any person for the purpose of soliciting business or pecuniary gain; and in order to ensure that that's the case, they give the official custodian certain powers.

Now, if the State truly has the right to control access to these records, which the Court feels they do, then this appears to be a proper statute which controls access to the records.

If we look at the Supreme Court decision of *Houchins*, [v. KQED, Inc., 438 U.S. 1 (1978)] I think that is law, even though it's a plurality and not a [p. 33] majority opinion; and I think *Houchins* controls. And in that case, which is 438 U.S. 1, 1978, and which has not been overturned and which has been cited with approval in many other cases, the Supreme Court actually discusses that there is no guaranty of a right to access to information such as criminal justice records.

I think it was in the *Capitol Cities* case, which has been cited by the plaintiff as assisting them – *Capitol Cities Media v. Chester*, 797 F.2d 1164. It's a Third Circuit, 1986 case. On page 1173, the court says, "*Houchins* retains its precedential value. Initially it should be pointed out that *Houchins* was not an abberation. There are a number of other cases which similarly indicate that the First Amendment guarantees no general access to government information."

And then later on on that page, the court goes on to say, "Other cases which develop the discussion in *Houchins* do not expressly or impliedly overrule *Houchins*. The cases hold no more than that the government may not close government proceedings which historically have been open unless public access contributes nothing of significant value to that process, or unless there is a compelling state interest in closure."

Well, the question is whether we're talking here about governmental procedures which historically have been open. And what we're talking about is governmental proceedings which historically have been limited by the government.

[p. 34] So it seems to this court that the better view is that we do not reach the constitutional issue under *Oklahoma Hospital Association*. The state cannot be compelled to divulge the information for all purposes, including lawyer advertising purposes. Under *Houchins*, Plaintiffs do not have a right of access to the records.

But even if we reach the constitutional issue based on the stipulations, it seems to me that looking at [*Adolph*] *Coors* [*Co. v. Brady*, 944 F.2d 1543 (10th Cir. 1991)] and [*Board of Trustees* v.] *Fox*, [492 U.S. 469 (1989)] there is – we look at the fit test developed by *Coors*. There is a fit in this case, because even if we go to that third position and say yes, there is an actual issue here and we have to see whether this statute is narrowly tailored to achieve the desired objective, the objective in the statute is that the Colorado Criminal Justice Records Act is not to be maintained as a client base for parties seeking commercial gain. That, it seems to me, is a legitimate governmental objective, as well as the protection of privacy of the individuals who have DUI and other serious similar offenses.

If, in fact, the statute in question is rationally related to limiting access under the Act to noncommercial purposes, purposes these parties are not seeking – as the statute says, pecuniary business – soliciting business for

pecuniary gain, then that is indeed a proper fit under the test.

And [In Re] *Anis* [599 A.2d 1265 (N.J. 1992)] is of course a different case. *Anis* is a plane crash, and people were grieving and particularly weak and [p. 35] vulnerable. But what *Anis* tells us is that the right of an attorney to reach or to communicate with people under all purposes is not – is not there.

Shapero [v. *Kentucky Bar Association*, 486 U.S. 466 (1988)] simply says that broad lawyer advertising is constitutionally protected commercial speech. The Court in *Shapero*, which is 486 U.S. 466, struck blanket prohibitions. It does not discuss whether there are particular situations where lawyer advertising may be regulated by the state; and *Anis* is such a case, the airplane accident case, for example, wherein the New Jersey Supreme Court has ruled that there are certain circumstances when there cannot be attorney contact within a certain period of time. And this has been upheld and I think would be probably upheld by the U.S. Supreme Court.

Maybe this isn't as serious a situation. If someone gets a DUI, it may not be like losing someone in an airplane crash; but indeed, where someone gets a DUI, families are weak, a person is vulnerable. You have some of the same considerations where you would want to protect the privacy of individuals. And this also may be a legitimate concern of the legislature and indeed was.

So we have two concerns of the legislature. We have a statute which is designed to meet those concerns rather tightly; and even if we do get to the *Coors* test, it appears to this court that this statute meets the test.

Accordingly, the Court will for the reasons stated [p. 36] deny Plaintiffs' Motion for a Preliminary Injunction, deny Plaintiffs' Motion for Summary Judgment, grant the State's Motion for Summary Judgment. And the statute, it appears to this court, is a proper statute; and thus the judgment will enter in favor of the State of Colorado and against the plaintiff and the case will be dismissed at this time.

Is there anything else that either side wishes to put on the record?

MR. GROSS: I guess this is a final order. We don't need a 54(b) –

THE COURT: Yes, I intend that this be a final order; and you'll have the right to take it up and let the Tenth Circuit take a look at it. My intent is to issue a final order of dismissal.

MR. GROSS: Thank you.

THE COURT: Okay. Thank you. I appreciate the briefs and the argument. It's been an interesting issue. And I think we have another matter, but not for a couple minutes. So we'll take a short recess and call up the 10:00 matter at 10:00.

(Thereupon, the hearing was concluded and the Court recessed at 9:55 a.m.)

* * *

Supreme Court, U.S.
FILED
NOV 8 1994
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No. 94-680

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE LAW FIRM OF LANPHERE & URBANIAK, GREGORY S. LANPHERE, and JOEL E. URBANIAK, individually and as partners thereof,
Petitioners,
vs.
STATE OF COLORADO, GALE A. NORTON, Attorney General for the State of Colorado, in her official capacity only, ROY ROMER, Governor of the State of Colorado, in his official capacity only,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether a reasonable restriction regarding immediate, direct access to government-held criminal justice records, based upon the intent to use such records for commercial speech, violates the First Amendment.

B. Whether one type of equal protection claim alleged in an amended complaint, and later neglected, may serve as the basis for another type of equal protection claim raised for the first time in a petition for writ of *certiorari* to the United States Supreme Court.

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No. 94-680

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE LAW FIRM OF LANPHERE & URBANIAK, GREGORY S. LANPHERE, and JOEL E. URBANIAK, individually and as partners thereof,
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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioners are licensed attorneys in the State of Colorado. Their practice involves defending persons who have been accused of traffic violations. The petitioners have used the criminal records of the State of Colorado ("State") to solicit clients for pecuniary gain.

In 1992, the State of Colorado amended its Criminal Records Act by adding § 24-72-305.5, which provides:

> **Access to records – denial by custodian – use of records to obtain information for solicitation.** Records of official actions and

> criminal justice records and the names, addresses, telephone numbers, and other information in such records shall not be used by any person *for the purpose of soliciting business for pecuniary gain*. The official custodian shall deny any person access to records of official actions and criminal justice records unless such person signs a statement which affirms that such records *shall not be used for the direct solicitation of business for pecuniary gain*. [Emphasis added.]

Under § 24-72-305.5, the petitioners' access to the records was denied because the petitioners refused to sign the statement described in the statute.

The petitioners brought suit in federal court for the District of Colorado. Based on stipulated facts, the district court entered judgment for the State. The district court found that the State cannot be compelled to divulge information for all purposes, including lawyer advertising. It was also found that, even if a constitutional right to access existed, § 24-72-305.5 is nevertheless sustainable because its provisions reasonably fit its objectives.

A majority panel of the Tenth Circuit Court of Appeals affirmed. The Tenth Circuit held that the First Amendment was implicated, because the Colorado legislature drew a regulatory line based on the commercial-speech use of the records. Applying *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 357 (1980), the Tenth Circuit concluded § 24-72-305.5 is constitutional because it protects the right to privacy, and maintains public confidence in the judicial system, without unduly burdening the petitioners' speech.

The petitioners seek a writ of *certiorari* for the purpose of obtaining review of § 24-72-305.5 under the First Amendment

and the equal protection clause. A denial of equal protection was not alleged by the petitioners during their appeal in the Tenth Circuit, nor did the Tenth Circuit decide that issue on its own.[1] The issue was mentioned in the amended complaint, although the petitioners never supported it thereafter.

SUMMARY OF THE ARGUMENT

Neither *Innovative Database System v. Morales*, 990 F.2d 217 (5th Cir. 1993) nor *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994) involve a critique of a statute like § 24-72-305.5. Section 24-72-305.5 does not raise any new or important constitutional issues.

The petitioners waived their right to raise an equal protection claim here because, although a claim was alleged in the amended complaint, it was not supported by any subsequent argument, and it was not the same type of claim raised in the instant petition.

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[1]The petition omits the fact that the district court below expressly refused to evaluate the petitioners' solicitation letters for any ethical improprieties. Some of the petitioners' letters were sent to individuals who already retained counsel. As a result, some of the recipients were confused by the letters.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION DOES NOT RAISE ANY NEW OR IMPORTANT CONSTITUTIONAL ISSUES.

Section 24-72-305.5 possesses unique characteristics, and it creates unique results. It creates two classes: (1) a class of persons that want access to government-held criminal records for purposes other than soliciting business for pecuniary gain; and (2) a class of persons that want access for the purpose of soliciting business for pecuniary gain. The former class members are granted access, after signing the statement the statute describes.

Section 24-72-305.5 does not, however, prohibit the members of the class that have access from passing the information the records contain on to the members of the class that do not have access. In other words, the statute does not interfere with communications made between the classes.

Section 24-72-305.5 does not prohibit speech, *per se*. It denies direct access to judicial records for commercial solicitation purposes. It does not deny indirect access for commercial purposes. For example, the statute tolerates those (such as the petitioners) who obtain the information from non-governmental sources (such as the local newspapers). Such indirect access may serve as the basis for commercial speech.

The indirect-access feature of the statute is important to the understanding of the restriction § 24-72-305.5 places on commercial speech. The restriction is represented by the delay in the communication of the information the records contain between the two classes the statute creates. Here, that restriction

is nominal, at best. A local newspaper immediately obtains and publishes the information.

The State possesses three policy interests that justify § 24-72-305.5. First, § 24-72-305.5 protects the privacy interests of those merely accused of criminal conduct.[2] Second, § 24-72-305.5 advances the State's interest in lessening the danger of overreaching by solicitors. It also advances the related interest of maintaining public confidence in our system of justice. Third, § 24-72-305.5 tends to restrict the use of the records to the uses originally intended -- the administration of justice and law enforcement.

Section 24-72-305.5 directly and immediately advances each of Colorado's policy interests. The State's interest in protecting the privacy interests of those merely accused of criminal conduct is an interest of the highest order. Immediately after being accused of a crime, an individual, although legally innocent, is vulnerable. The individual requires a brief period to control his emotions and make a reasoned decision about whether or not he should defend himself. That opportunity is disrupted when the individual knows others have access to the fact that he has been accused and will immediately descend upon him for his business. Section 24-72-305.5 protects an individual's ability to evaluate his legal interests in private. And it fosters respect for the judicial system by refusing direct State assistance to those who seek to profit from an individual's misfortune.

Simultaneously, § 24-72-305.5 tends to limit the use of the records to their original purposes. Colorado's criminal records system was created for the purpose of law enforcement and the

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[2]Some of the accused that received the petitioners' solicitations were subsequently acquitted. For them, the invasion of their privacy by the petitioners was most profound.

administration of justice. It was never thought that the records in question would serve as a private-sector client base. It has never been disputed that the original purposes of the records system are important and legitimate, or that the State could not limit the records to those purposes.

Contrary to the petitioners' assertions, the Tenth Circuit's analysis falls squarely within the analysis of *Shapero v. Kentucky Bus Ass'n*, 486 U.S. 466 (1988). As the Tenth Circuit noted, the Supreme Court has held that the invasion of privacy occurs when the lawyers discover the individual's legal affairs. The Tenth Circuit properly concluded that this case involves the invasion of privacy as defined in *Shapero*. Therefore, this case does not address new or important constitutional issues.

II. *INNOVATIVE DATABASE SYSTEMS V. MORALES*, 990 F.2D 217 (5TH CIR. 1993) AND *SPEER V. MILLER*, 15 F.3D 1007 (11TH CIR. 1994) DO NOT CONFLICT WITH THE OPINION OF THE TENTH CIRCUIT.

Innovative Database Systems v. Morales, 990 F.2d 217 (5th Cir. 1993) is distinguishable from the instant case. In *Innovative*, the court evaluated a Texas statute prohibiting persons in possession of law enforcement information from using the information to contact a crime victim or a person involved in a motor vehicle accident or a member of the person's family for the purpose of soliciting business from the person or the family member. The statute also prohibited such persons from selling the information to another person for financial gain.

Unlike § 24-72-305.5, the Texas statute was not an access-to-judicial-records statute. It was a direct-burden-on-speech statute. Statutes involving direct burdens on speech are held to

an unqualified First Amendment standard. By contrast, access-to-judicial-records statutes, like § 24-72-305.5, are held to a two-pronged, First Amendment standard. *For example*, *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

The *Innovative* court was not asked to evaluate all the same interests asserted here under the same circumstances presented here. Texas attempted to justify a total ban on the use of lawfully obtained, public information to contact certain people in the name of promoting ethical standards, preventing fraud and misrepresentation by professionals, and protecting the public from unnecessary, inflated insurance rates. This case involves, not only overreaching by professionals, but, also, privacy rights and restricting the records to their original uses.

The *Innovative* statute involved a direct, total ban on any type of speech. Under those circumstances, it was appropriate for the court to evaluate the statute under *Shapero v. Kentucky Bar Ass'n.*, 485 U.S. 466 (1988). By contrast, § 24-72-305.5's access-to-records restriction only indirectly burdens speech, and is properly evaluated under the analysis contained in *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) and *Central Hudson*, *supra*. *Shapero* is only tangentially related to the analysis.

Speer v. Miller, 15 F.3d 1007 (11th Cir. 1994) involved the enforcement of a Georgia statute prohibiting access to law enforcement records for the purpose of obtaining the names and addresses of victims of crimes or persons charged with crimes or persons involved in motor vehicle accidents or other information contained in such records for commercial solicitation of the individuals or the relatives of such individuals.

The *Speer* court was asked to conduct an interlocutory review of a denial of a motion for preliminary injunction. The

court reversed and remanded, finding that the statute probably impinged upon the movant's commercial speech.

That *Speer* involved an interlocutory appeal of an order denying a preliminary injunction is an important, distinctive characteristic. Unlike the instant case, no state interests were asserted in *Speer* in defense of the Georgia statute. The *Speer* court expressly held that Georgia had no opportunity to develop its interest in the area, and remanded the case for reconsideration after a plenary hearing. It is, therefore, premature to conclude *Speer* conflicts with the Tenth Circuit's decision.

In addition, the *Speer* court ignored the case law analyzed in detail in the Tenth Circuit opinion below. As such, the *Speer* decision, like the *Innovative* decision, does not contain any analysis of the access-to-records authorities on the subject. Nor does it apply *Central Hudson, supra*. Devoid of analysis as rigorous as the Tenth Circuit's analysis, *Speer* is not persuasive.

III. THIS COURT SHOULD NOT HEAR AN ISSUE THAT WAS NOT ARGUED TO THE COURTS BELOW. THEREFORE, THE PETITIONERS' EQUAL PROTECTION CHALLENGE SHOULD NOT BE HEARD BY THIS COURT.

The petitioners further challenge § 24-72-305.5 on equal protection grounds. They claim the equal protection problem exists by virtue of the fact that the statute permits access for noncommercial solicitations and prohibits access for commercial solicitations. However, to properly raise the issue before this Court, the petitioners should have argued it to the district court, and raised it again for the Tenth Circuit. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Lincoln Engineering Co. v. Stewart-Warner Corp.*, 303 U.S. 545 (1938).

The petitioners alleged a denial of equal protection in their amended complaint. However, the allegation was different from the one contained in the instant petition. In the amended complaint, the petitioners alleged that it was unconstitutional for the State to grant access to civil records but not criminal records. The petitioners did not pursue the claim before the district court, nor did they raise it for the Tenth Circuit. The claim has been waived. The claim contained in the petition has never been raised before. Therefore, both equal protection claims are barred.

CONCLUSION

The State respectfully requests an order denying the Petition for Writ of *Certiorari*.

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